IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1714

HOWARD A. KIDDER,

Petitioner,

versus

BOB ANDERSON AND
CAPITAL CITY PRESS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

This is a libel action by Howard A. Kidder against Capital City Press, Inc., and its reporter, Bob Anderson, arising out of a series of newspaper articles and an editorial appearing

in the Morning Advocate and State-Times newspapers from June 12, 1974 through August 8, 1974. Copies of these articles and editorials have been reproduced in Appendix E of the petition for a Writ of Certiorari at pps. 116 et seq.

Generally speaking, the statements of fact contained in these newspaper articles were based on public records and upon signed statements of witnesses, most of which were obtained prior to publication of the articles in question.

See *Kidder v. Anderson*, 354 So.2d 1306 (La. 1978) at p. 1309 in which the Louisiana Supreme Court found as follows with regard to these articles:

> "In each instance, the published statements were based upon interviews, generally corroborated by written statements taken at the time, with individuals in an apparent position to know of the factual accuracy of the information conveyed.
>
> "The record discloses no reason for Anderson or his publisher to doubt the trustworthiness of the information received by them and subsequently published."

The petition for Writ of Certiorari does not dispute this finding.

Prior to trial, defendants filed two motions for partial summary judgment. The first of these motions related to the article entitled, "Statements Say Police Officer Protected Gambling, Barrooms." The second motion for partial summary judgment related to the remaining articles of which petitioner complained.

The trial court denied both of these motions for partial summary judgment. The jury returned a general verdict for the petitioner and found damages in the amount of $400,000.

The majority opinion of the Louisiana Court of Appeal for the First Circuit affirmed the judgment for the plaintiff, but reduced the award of damages to $100,000. One judge dissented on the ground that the motions for partial summary judgment should have been granted because the petitioner did not produce any evidence in opposition to said motions showing "malice" as defined in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed2d 686, 84 S.Ct. 710 (1964) and its sequelae. See *Kidder v. Anderson*, 345 So.2d 922 (La. App. 1977).

The Louisiana Supreme Court reversed on the ground that there was no evidence of "malice" sufficient to sustain a jury verdict.

It is from this decision that the plaintiff is seeking a Writ of Certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. There is no evidence in the record, nor before this court, which could possibly sustain a finding of *New York Times* actual malice.

In *New York Times v. Sullivan*, 376 U.S. 254, 284, 285, 11 L.Ed2d 686, 709, 710 (1964), this court overturned an Alabama jury verdict on the ground that the evidence before that jury could not constitutionally sustain a verdict for the plaintiff, as follows:

> "Since respondent may seek a new trial, we deem that

considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser v. Randall*, 347 US 513, 525, 2 L.Ed2d 1460, 1472, 78 S.Ct. 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp v. Florida*, 328 US 331, 335, 90 L.Ed 1295, 1297, 66 S.Ct. 1029; see also *One, Inc. v. Oleson*, 355, U.S. 371, 2 L.Ed2d 352, 78 S.Ct. 364; *Sunshine Book Co. v. Summerfield*, 355 US 372, 2 L.Ed2d 352, 78 S.Ct. 365. We must 'make an independent examination of the whole record.' *Edwards v. South Carolina*, 372 US 229, 235, 9 L.Ed2d 697, 702, 83 S.Ct. 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

"Applying these standards, we consider that the **proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands**, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law."

The Louisiana Supreme Court has followed the same procedure in reversing the jury verdict in this case. Thus, it is

encumbent upon the petitioner in this case, as it has been throughout this litigation, to present evidence of *New York Times* actual malice, i.e., that Capital City Press and its reporter, Bob Anderson, actually knew that one or more facts reported were false at the time of publication or that they entertained serious doubt as to the truth of any fact reported.

The petitioner has presented no such evidence throughout this litigation, nor is any such evidence contained in the petition, although the petitioner is free under Rule 21 of the Supreme Court Rules to request certification of any part of the record and evidence which could be construed as showing *New York Times* actual malice.

Rather than presenting any evidence relating to the specific facts reported in the newspaper articles in question and any evidence relating to the surrounding circumstances at the time of publication, the petitioner has relied on general statements of malice in the traditional sense, i.e., that defendants and others were "out to get" Howard Kidder and to prevent him from being named as permanent Chief of Police for the City of Baton Rouge.[1] To buttress so-called evidence of malice, the inflammatory word "conspiracy" is repeatedly used by petitioner.

The Louisiana Supreme Court dealt with this argument in the following language:

"That police officers were disgruntled and antagonistic

1. Unquestionably, many of the persons who gave statements to Bob Anderson were "out to get" Howard Kidder, in the sense that they did not believe him qualified to be Chief of Police. However, the obvious reason for the hostility of these persons was their knowledge of Howard Kidder, as contained in those statements, rather than any unspecified and unreasoning Machiavellian hatred.

to their proposed chief is not necessarily an indication of their unreliability as informants. In fact, some of these very police officers now attacked as unreliable have often appeared as witnesses in criminal prosecutions by the state, with their credibility vouched for by officers of the state . . .

"With regard to the reliability of the information conveyed by these police officers, the criterion is not whether they were motivated by selfish reasons to furnish the derogatory information. Rather, it is whether or not they were in a position to obtain the information furnished by them, and whether or not the report they conveyed was so inherently improbable as to create indisputable doubt as to its authenticity." 354 So.2d 1306, 1309.

Next, petitioner complains that some persons who gave statements were gamblers and bar maids and that persons of this kind are so well known to be untruthful in every respect that their occupations alone give rise to a knowledge of falsity.[2]

Here again, the Louisiana Supreme Court disposed of this contention by holding:

"We are unable to accept the inference that, therefore, the reporter should not have relied upon information as to bribery conveyed by them. Just as the state is rarely in a position to rely upon the testimony of church wardens and Sunday-school teachers to prove criminally corrupt activities of public officials, so newspaper investigation of reports of corruption must often obtain first-

2. A reading of the "Prostitution" article (Petition p 128) reveals that the informants were a medical doctor and two police officers. The "Barroom" article (Petition p 116) refers to statements about Kidder by two employees of bars, two alleged gamblers, police officers, and Kidder's brother-in-law, Jim McBride.

hand corroboration from those present in the barrooms or gambling houses, rather than from citizens who spend their time only at home, in church, or at work in less colorful occupations." 354 So.2d 1306, 1309.

What is totally lacking in this case, and in the petition for certiorari, is any evidence of any circumstance, other than occupation, known to Bob Anderson prior to publication about these persons whose statements were relied on, which would possibly give rise to a knowledge of falsity, or serious doubt as to truth of the contents of these statements.

Petitioner's overly broad generalizations that *New York Times* actual malice existed, must not be given any weight, in the absence of any evidence in the record or before this Court which would support a jury finding of actual malice as to any fact reported.

Similarly, as the Louisiana Supreme Court found, the petitioner failed to present any evidence in opposition to the motions for partial summary judgment of *New York Times* actual malice with respect to any fact reported. 345 So.2d at p. 1310.

II. Petitioner also claims, for the first time, that his rights to a jury under the Seventh Amendment of the United States Constitution as incorporated into the Fourteenth Amendment, were violated.[3] The predicate for this claim must be some evidence which could sustain a Seventh Amendment jury finding of *New York Times* actual malice. In fact, *New*

3. This Court has previously held that it will not decide constitutional issues raised before it for the first time. 28 U.S.C.A. 1257; Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed2d 398, 89 S.Ct. 1162 (1969); see also this Court's Rule 23(1)(f), which is not observed in petitioner's application filed in this case.

York Times is strikingly similar to the present case in that it involves a State Court jury verdict in favor of a local official against the publisher. This Court did not find itself inhibited in reversing such a jury verdict when the constitutionally required evidence of "malice" by "clear and convincing evidence" was not found in the record of the case.

Here the Louisiana Supreme Court, after a review of the evidence, specifically found:

> "The **record discloses no reason** for Anderson or his publisher **to doubt the trustworthiness of the information received** by them and subsequently published." 354 So.2d 1306, 1309 [Emphasis Added]

In view of the factual finding by the State Court of **no** evidence to support a finding of "malice," even the "common law" rule of the Seventh Amendment would not prevent reversal of a jury verdict which has no evidence of record to support it. This case does not, therefore, present an instance of a differing result under "the common law" rule as to jury verdicts, with that reached by the Supreme Court of Louisiana.

It should also be noted that the Louisiana Supreme Court held that defendants' motions for summary judgment were improperly denied (see 354 So.2d 1306, 1310). Clearly, therefore, this case should never have reached the trial stage nor have been submitted to the jury in the first instance. Therefore, what the jury may or may not have found based on the evidence presented at trial need not be considered or examined in order to support the correctness of the judgment rendered by the Louisiana Supreme Court.

For all of the foregoing reasons, the instant case simply is not one in which there has been heretofore, nor is now in question, any alleged conflict between Louisiana appellate procedure and petitioner's alleged rights under the Seventh Amendment.

CONCLUSION

The Louisiana Supreme Court has applied the same standards of review as set forth by this Court in *New York Times v. Sullivan*, cited supra, and has reached the same result for the same reasons. This petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, of counsel for defendants, Bob Anderson and Capital City Press, Inc., do hereby certify that three (3) copies of the above and foregoing brief in opposition to petition for certiorari have been mailed this day, postage prepaid, to Mr. Robert L. Kleinpeter, P. O. Box 66443, Baton Rouge, Louisiana 70896.

Baton Rouge, Louisiana, this _____ day of June, 1978.

F. W. Middleton, Jr.